A

WONG SIN FAN & ORS

v.

NG PEAK YAM & ANOR

B

COURT OF APPEAL, PUTRAJAYA
ZAINUN ALI JCA
RAMLY ALI JCA
ZAHARAH IBRAHIM JCA
[CIVIL APPEAL NO: W-02-(IM)-2880-2010]

C

5 MAY 2011

COMPANY LAW: *Liquidators - Removal - Appellants appealing against dismissal of application to remove liquidators - Whether sufficient cause shown for removal - Whether appellants motivated by selfish*

D

personal reasons to remove liquidators - Issues resolved in previous suit between parties and consent order entered without liberty to file afresh - Whether appellants barred from raising same issues on appeal

CIVIL PROCEDURE: *Res judicata - Issue estoppel - Appeal against dismissal of application to remove liquidators - Issues raised by appellant*

E

resolved in previous suit between parties - Consent order entered in suit without liberty to file afresh - Whether appellants barred from raising same issues in appeal - Whether sufficient cause shown for removal of liquidators - Whether appellants motivated by selfish personal reasons to remove liquidators - Whether abuse of process of court

F

The appellants brought this appeal against the dismissal by the High Court of their application ('the removal application') to *inter alia* remove the respondents as liquidators of Folin Brothers Sdn Bhd ('Folin Brothers') and for leave to commence misfeasance

G

proceedings against them. The appellants alleged the liquidators had acted negligently and in breach of trust and fiduciary duties and were not fit and proper to be liquidators. The appellants complained that the liquidators had (i) made unexplained or unsubstantiated payments of legal fees; (ii) paid the untaxed bills

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of solicitors who had acted for Folin Brothers; (iii) ignored requests by the Committee of Inspection ('COI') for accounts of Folin Brothers; (iv) failed to consider the wishes of the COI and the appellants on the disposal of assets of Folin Brothers; (v) failed to abide by a consent order in an 'oppression suit' brought

I

by the appellants against the liquidators; and (vi) made unauthorised payments connected with that suit for their own benefit.

Folin Brothers was wound up by the court on the third appellant's petition. Its only substantial asset was the one million shares it owned in the paid-up capital of its subsidiary, Folin Food Processing Sdn Bhd ('Folin Food'). The other seven shares of Folin Food's paid-up capital were held - one each - by the liquidators on trust for Folin Brothers, the three appellants, a deceased brother of the appellants and the latter's son. The liquidators were directors of Folin Food by virtue of their position as liquidators of Folin Brothers. The only asset the dormant Folin Food owned was a commercial property ('the property') from which it derived rental income. At the time of the liquidators' appointment, both Folin Brothers and Folin Food were embroiled in several legal suits concerning the assets of both companies. The suits had for a long while been dormant but with the appointment of the liquidators, the latter, with the co-operation of the appellants, brought about a global settlement to most of the suits. One of the effects of the settlement was the return of the property, unencumbered, to Folin Food. With the return of the property, the liquidators decided to conclude the liquidation by voluntarily winding up Folin Food and realising Folin Brothers' investment in Folin Food. A majority resolution of the board of directors was passed to that effect but the first appellant, who was the dissenting minority director, opposed the resolution. The appellants, being the minority shareholders in Folin Food, filed a petition seeking relief against oppression under s. 181 of the Companies Act 1965 ('the oppression suit') and sought to injunct the liquidators from taking further steps to voluntarily wind up Folin Food. Following numerous exchanges of affidavits by both parties, a consent order was entered into to resolve the dispute. The order specifically provided that there was to be no liberty to file afresh. By the terms of the consent order, the liquidators were to sell the shares of Folin Food to the appellants upon a fair market price for them being determined. The liquidators felt the shares had been under-valued by Messrs. Ernst & Young and filed a suit to have the shares revalued. The appellants counter-claimed for specific performance at the value already made. Before the suit could be determined, the appellants filed the removal application to remove the liquidators.

A B C D E F G H I

Held (dismissing the appeal with RM20,000 costs and affirming the decision of the High Court)
Per Ramly Ali JCA delivering the judgment of the court:

(1) All the ingredients to establish issue estoppel were satisfied. The consent order put to rest, once and for all, all issues in dispute between the parties in the oppression suit and the issues could not be raised again in subsequent proceedings either for the same, or for a different, cause of action. (para 30)

(2) The consent order clearly stated there was to be no liberty to file afresh. It was a final and conclusive judgment on the merits between the parties. (para 26)

(3) The appellants sought the consent order to be enforced against Folin Brothers and the liquidators in other proceedings but took a completely inconsistent stand in the present application by raising issues that had been settled by the consent order. This was clearly an abuse of process. (para 35)

(4) The appellants failed to show sufficient cause for removal of the liquidators. It had not been shown the liquidators had abused their position for personal gain or benefit; or had not been able to act independently; or were no longer fit and proper to continue as liquidators for Folin Brothers. (paras 79 & 80)

(5) To remove the liquidators at this late stage of the liquidation was inappropriate and not in the interest of the company and its creditors. The only persons who stood to benefit most if they were removed were the appellants themselves - for being able to buy Folin Food's shares (the only asset owned by Folin Brothers) at an undervalued price as determined by Messrs Ernst & Young under the consent order, detrimental to the interest of other creditors and contributories. (para 81)

(6) The removal application was brought by the appellants clearly for the collateral purpose of controlling Folin Brothers, Folin Food and their assets so as to enrich themselves. This was an abuse of process of court and was not to be allowed. (para 81)

Bahasa Malaysia *Translation Of Headnotes*

Perayu telah membuat rayuan ini terhadap keputusan Mahkamah Tinggi menolak permohonan mereka ('permohonan menyingkirkan') untuk *inter alia* menyingkirkan responden-responden sebagai likuidator-likuidator Folin Brothers Sdn Bhd ('Folin Brothers') dan untuk kebenaran untuk memulakan prosiding misfeasans terhadap mereka. Perayu mendakwa bahawa likuidator-likuidator telah bertindak dengan cuai dan telah memungkiri kewajipan amanah dan fidusiari dan tidak sesuai dan betul untuk menjadi likuidator-likuidator. Perayu-perayu mengadu bahawa likuidator-likuidator telah (i) membuat bayaran di sisi undang-undang yang tidak diterangkan dan tiada beralasan; (ii) membayar bil peguam Folin Brothers yang tidak dikenakan cukai; (iii) tidak menunaikan permintaan-permintaan Committee of Inspection ('COI') untuk akaun Folin Brothers; (iv) gagal mempertimbangkan kehendak-kehendak COI dan perayu-perayu atas pelupusan aset-aset Folin Brothers (v) gagal mengikut perintah penyetujuan hasil guaman menindas yang dibawa perayu-perayu terhadap likuidator-likuidator dan (vi) membuat pembayaran tidak dibenar berhubung guaman tersebut untuk manfaat mereka sendiri.

Folin Brothers telah digulung oleh mahkamah atas petisyen perayu ketiga. Satu-satunya asset Folin Brothers ialah satu juta syer yang dimilikinya dalam modal yang telah dibayar subsidiarinya, Folin Food Processing Sdn Bhd ('Folin Food'). Syer tujuh yang lain modal telah dibayar Folin Food dipegang - setiap satu - oleh likuidator-likuidator atas amanah untuk Folin Brothers, ketiga-tiga perayu, si mati adik lelaki perayu-perayu dan anak si mati adik lelaki tersebut. Likuidator-likuidator adalah pengarah-pengarah Folin Food disebabkan kedudukan mereka sebagai likuidator-likuidator Folin Brothers. Aset yang hanya dimiliki Folin Food yang tidak aktif itu ialah harta komersial ('harta tersebut') di mana ianya mendapat pendapatan melalui sewaannya. Pada masa perlantikan likuidator-likuidator, kedua-dua Folin Brothers dan Folin Food terbabit dalam beberapa guaman-guaman berkaitan aset-aset kedua-dua company tersebut. Guaman-guaman tersebut untuk lamanya tidak aktif tetapi dengan perlantikan likuidator-likuidator, likuidator-likuidator dengan kerjasama perayu-perayu telah membawa penyelesaian global kepada kebanyakan guaman-guaman tersebut. Salah satu kesan penyelesaian tersebut adalah untuk harta dipulangkan dengan tiada bebanan, kepada Folin Food. Dengan

pemulangan harta tersebut, likuidator-likuidator memutuskan untuk menyimpulkan penyelesaian dengan menggulung secara sukarela Folin Food dan menghasilkan pelaburannya. Satu resolusi majoriti lembaga pengarah-pengarah diluluskan berhubungannya tetapi perayu pertama iaitu pengarah minoriti yang bertentangan, membantah resolusi itu. Perayu-perayu, yang merupakan pemegang-pemegang syer minoriti di Folin Food, memfailkan petisyen untuk relif terhadap penindasan di bawah s. 181 Akta Syarikat 1965 ('guaman tindasan') dan memohon untuk menahan likuidator-likuidator daripada mengambil langkah-langkah seterusnya untuk menggulungkan Folin Food secara sukarela. Seterusnya dengan penukaran afidavit-afidavit oleh kedua-dua parti-parti tersebut, satu perintah penyetujuan telah dimasuki untuk menyelesaikan pertikaian tersebut. Perintah tersebut secara khususnya menetapkan bahawa tiada kebebasan untuk memfailkan semula. Mengikut terma-terma perintah penyetujuan, likuidator-likuidator mesti menjual syer-syer Folin Food kepada perayu-perayu berdasarkan harga pasar yang adil untuk ditentukan. Likuidator-likuidator berpendapat syer-syer telah dinilai rendah oleh Tetuan Ernst & Young dan memfailkan guaman untuk syer-syer tersebut untuk dinilai semula. Perayu-perayu menuntut balas untuk pelaksanaan spesifik pada nilai yang telah ditetapkan. Sebelum guaman tersebut boleh ditentukan, perayu-perayu telah memfailkan permohonan menyingkirkan likuidator-likuidator ini.

Diputuskan (menolak rayuan dengan kos RM20,000 dan mengesahkan keputusan Mahkamah Tinggi)

Oleh Ramly Ali HMR menyampaikan penghakiman mahkamah:

(1) Kesemua ingredien bagi membuktikan isu estoppel telah dipenuhi. Perintah penyetujuan telah pun menyelesaikan sama sekali semua isu-isu dalam pertikaian di antara pihak-pihak dalam guaman tindasan dan isu-isu tersebut tidak boleh dibangkitkan lagi dalam prosiding terkemudian sama ada untuk kausa tindakan yang sama atau yang berbeza.

(2) Perintah penyetujuan dengan jelasnya telah menyatakan bahawa tiada kebebasan untuk memfail semula. Ianya penghakiman yang terakhir dan muktamad atas merit di antara pihak-pihak berkenaan.

(3) Perayu-perayu telah memohon untuk perintah penyetujuan dikuatkuasakan terhadap Folin Brothers dan likuidator-likuidator di prosiding-prosiding lain tetapi telah mengambil

kedudukan berbeza sama sekali dalam permohonan semasa dengan membangkitkan isu-isu yang telah diselesaikan oleh perintah penyetujuan. Ia dengan jelasnya merupakan satu penyalahgunaan proses mahkamah.

(4) Perayu-perayu gagal menunjukkan kausa mencukupi untuk menyingkirkan likuidator-likuidator. Ianya tidak dibuktikan bahawa likuidator-likuidator telah menyalahgunakan kedudukan mereka untuk manfaat atau keuntungan mereka sendiri; atau tidak boleh bertindak dengan bebas; atau tidak lagi sesuai dan betul untuk menyambung sebagai likuidator-likuidator bagi Folin Brothers.

(5) Ianya tidak betul untuk menyingkirkan likuidator-likuidator pada tahap akhir penyelesaian dan tidak dalam kepentingan syarikat atau pemiutang-pemiutang. Pihak yang hanya akan beruntung sama sekali jika likuidator-likuidator disingkirkan ialah perayu-perayu sendiri - kerana membeli syer-syer Folin Food (aset yang hanya dimiliki oleh Folin Brothers) pada harga yang dinilai rendah seperti yang ditentukan oleh Tetuan Ernst & Young di bawah perintah penyetujuan, maka menjejaskan kepentingan pemiutang-pemiutang dan kontributori-kontributori lain.

(6) Permohonan menyingkirkan dengan jelasnya dibawa perayu-perayu untuk tujuan kolateral bagi mengawal Folin Brothers, Folin Food dan aset-aset mereka bagi memperkayakan diri mereka. Ini adalah satu penyalahgunaan proses mahkamah dan tidak mesti dibenarkan.

Case(s) referred to:

Abric Project Management Sdn Bhd v. Palmshine Plaza Sdn Bhd & Anor [2007] 10 CLJ 7 HC ***(refd)***

Advance Housing v. Newcastle Classic Developments [1994] 14 ACSR 230 ***(refd)***

Asia Commercial Finance (M) Berhad v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 SC ***(refd)***

Avon Downs Pty Ltd v. FC of T [1949] 78 CLR 353 ***(refd)***

Bradford & Bingley Building Society v. Seddon [1999] 1 WLR 1482 ***(refd)***

Chua Boon Chin v. JM McCormack & Ors [1978] 1 LNS 33 HC ***(refd)***

Commonwealth of Australia v. O'Reilly [1984] 52 ALR 031 ***(refd)***

Goh Nellie v. Goh Lian Teck & Ors [2007] 1 SLR 453 ***(refd)***

Greenhalgh v. Mallard [1947] 2 All ER 255 ***(refd)***

Hunter v. Chief Constable of West Midlands Police [1982] AC 529 ***(refd)***

Johnson v. Gore Wood & Co (a firm) [2002] 2 AC 1 ***(refd)***

Kang Wah Construction Sdn Bhd v. Chan Ai Min Property Sdn Bhd & Anor [1999] 7 CLJ 172 HC ***(refd)***
Kinch v. Walcott [1929] AC 482 ***(refd)***
Lee Tat Development Pte Ltd v. Management Corporation of Grange Heights Strata Title No 301 (No 2) [2005] 3 SLR 157 ***(refd)***
Leon v. York -O- Matic [1966] 1 WLR 1450 ***(refd)***
Mc II Kenny v. Chief Constable of West Midlands [1980] QB 283 ***(refd)***
Oriental Finance Bhd v. Syarikat Seri Paroi Sdn Bhd [2003] 7 CLJ 414 HC ***(refd)***
Re Adam Eyton Limited; Exparte Charlesworth [1887] 36 Ch D 299 ***(refd)***
Re George A Bond & Co Ltd [1932] 32 SR (NSW) 301 ***(refd)***
Re Mineral Securities Australia Limited [in liq] [1973] 2 NSWLR 207 ***(refd)***
Re Sir John Moore Gold Mining Co [1879] 12 LR ***(refd)***
Re White Cliffs Dredging Co [1893] 11 NZLR 711 ***(refd)***
Reichel v. Magrath [1889] 14 App Cas 665 ***(refd)***
Ricky Thong Yew Fook v. OCBC Bank (M) Bhd & Ors [2007] 10 CLJ 720 HC ***(refd)***
Selvam Holdings (Malaysia) Sdn Bhd v. Toby Lam As The Receiver And Manager And Liquidator Of Selvam Holdings (M) Sdn Bhd & Anor [1994] 4 CLJ 899 HC ***(refd)***
Seruan Gemilang Makmur Sdn Bhd v. Badan Perhubungan UMNO Negeri Pahang Darul Makmur [2009] 1 LNS 1457 HC ***(refd)***
Subterranean Natural Mineral Water Sdn Bhd v. Kho Boon Kwang [2002] 6 CLJ 340 HC ***(refd)***
Thoday v. Thoday [1964] P 181 ***(refd)***
Yeomans v. Walker & Anor [1986] 10 ACLR 753 ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 181, 232(1), 236(1), (2)
Companies Winding-Up Rules 1972, r. 173

Other source(s) referred to:
KR Handley, Spencer Bower, Turner and Handley, *The Doctrine of Res Judicata*, Butterworths, 3rd edn, 1996, para. 182
Andrew R Keoy, Mc Pherson, *The Law of Company Liquidation*, 4th edn, p 338

For the appellants - Ira Biswas (Sharmala Balansundaram & Firdaus Husni); M/s Chooi & Co
For the 1st respondent - Fiona Bodipalar (James Chow, Daren Loi & Natasha Louis with her); M/s Chow Kok Leong
For the 2nd respondent - PH Cheah; M/s Raja Eleena Siew Ang

[Appeal from High Court, Kuala Lumpur; Companies Winding Up No: 66 of 1980]

Reported by Ashok Kumar

JUDGMENT

Ramly Ali JCA:

The Appeal

[1] This is an appeal against the decision of the learned High Court judge made on 15 September 2010, whereby he dismissed the appellants' application *vide* notice of motion dated 19 April 2010 in encl. 368 made under s. 232(1) of the Companies Act 1965 for an order to remove the respondents as Liquidators of Folin Brothers Sdn Bhd and replace them with one Yeap Chang Chuan; for leave to commence misfeasance proceedings against the liquidators and other consequential orders as set out in the prayers.

The Appellants' Notice Of Motion (encl. 368)

[2] The appellants sought to remove the respondents as liquidators on the ground that they have acted in breach of trust, in breach of their fiduciary duties and negligently. The allegations raised by the appellants as set out in their various affidavits are summarised as follows:

(a) that the respondents made unauthorized payments in relation to Kuala Lumpur High Court Petition No. D4-26-74-2008 ("the oppression suit") for the benefit of the liquidators;

(b) that the respondents paid the bills of solicitors acting for Folin Brothers without taxation of their bills contrary to r. 173 of the Winding Up Rules 1972;

(c) that the respondents made an unsubstantiated payment of fees to a law firm of Messrs Joseph Yeo;

(d) that the respondents failed to explain an apparent double payment of fees to a law firm of Messrs D Mathews;

(e) that the respondents ignored requests made by the committee of inspection for accounts of Folin Brothers;

(f) that the respondents failed to consider the wishes of the appellants and the committee of inspection on the disposal of assets of Folin Brothers;

(g) that the respondents failed to abide by the consent order dated 4 June 2009 in the oppression suit; and

A (h) that the respondents' conduct in relation to the affairs of Folin Brothers' subsidiary, namely Folin Food, shows they are not fit and proper persons to be liquidators.

Factual Background

B **[3]** Folin Brothers, a company incorporated under the Companies Act 1965, was wound up in 1987 by court upon the application of the 3rd appellant. The 1st and 2nd respondents were appointed as joint liquidators of the company in 1997 and are actually the 3rd set of liquidators so far appointed. Folin C Brothers ceased operation many years ago and its only substantial assets are the shares it owns in its subsidiary, Folin Food Processing Sdn Bhd (Folin Food).

[4] Folin Food too ceased operation many years ago and for the D greater part of the last 20 years only derived rental income from a commercial property it owns known as Lot 16. Folin Food has an issued and paid up capital of 1,000,007 units of shares of RM1 each. Folin Brothers is the registered shareholder of 1,000,000 shares in Folin Food and the Joint Liquidators (the Respondents) E each hold 1 share on trust for Folin Brothers. Folin Brothers owns over 99.9% of the shares of Folin Food. The liquidators are also directors of Folin Food by virtue of their position as liquidators of the holding company, Folin Brothers.

F **[5]** The appellants each hold 1 share in Folin Food and the remaining two shares in Folin Food are registered in the names of the appellants' late brother, Wong Foh Ling and his eldest son, Wong Boon Sun. The appellants each own 25% of the issued and paid up share capital of Folin Brothers and the remaining G balance 25% is registered in the names of the late Wong Foh Ling and Wong Boon Sun. (At the material times, the estates of the late Wong Foh Ling and Wong Boon Sun were vested in the official assignee by virtue of both of them having been adjudicated bankrupt).

H **[6]** At the point the respondents took office as liquidators, both Folin Brothers and Folin Food were engaged in several legal suits relating to the assets of Folin Brothers and Folin Food. The suits had been dormant for some considerable time prior to the I liquidators' appointment. Upon assuming office, the liquidators (with the active collaboration and participation of the appellants and in particular, the 1st appellant) pursued the litigation

vigorously over the years. In addition, new proceedings were also commenced. The litigation resulted in a global settlement in 2007 which effectively resolved most of the suits and the claims.

[7] The net effect of the global settlement resulted in Standard Chartered Bank Berhad writing off its claim for monies owing and agreeing to discharge the charge over the title of Lot 16 and return the same to Folin Food and cancelling the personal guarantees of the previous directors including the 2nd appellant.

[8] Prior to the global settlement, the liquidation process was hampered as there were no real assets available for realization. It was only after the title to Lot 16 was discharged and returned were the liquidators in a position to take steps to conclude the liquidation exercise.

[9] It is important to note that in all the years from the time of the appointment of the liquidators in 1997 to the time the global settlement was entered into in 2007, there was never any complaint or allegation by the appellants or the committee of inspection which was formed in 2006 against the liquidators. Indeed the relationship was cordial all the while.

[10] Upon the title to Lot 16 being returned unencumbered, the Liquidators exercised their commercial decision and were of the opinion that the best way to realise Folin Brothers' investment in Folin Food and conclude the long drawn out liquidation was for Folin Food to be wound up voluntarily and placed in the hands of an independent profesional. This was largely because Folin Food has been inactive for over 20 years and only collected rentals.

[11] The board of directors of Folin Food passed a resolution by a majority to recommend to the members that Folin Food be voluntarily wound up. The 1st appellant was the dissenting minority director who opposed the resolution. This was the start of the disputes between the appellants and the liquidators.

[12] The appellants, as contributories of Folin Food (holding less than 1% of the issued and paid up capital of Folin Food) then filed a petition *vide* Kuala Lumpur High Court Petition No. D4-26-74-2008 seeking relief against oppression of minority shareholders under s. 181 of the Companies Act 1965 ("the oppression suit") and sought to injunct the liquidators from causing Folin Brothers to exercise their right to vote in favour of a voluntary liquidation of Folin Food.

[13] The appellants raised numerous allegations against the liquidators. The liquidators responded via their affidavits in reply and controverted each and every allegation leveled against them in the oppression suit. On 4 June 2009, the day of the hearing of the oppression suit, a consent order was entered into between the appellants and the respondents as a settlement of the claims by the appellants and it was specifically provided that there be no liberty to file afresh.

[14] By the terms of the consent order, the liquidators agreed to sell the shares of Folin Food to the appellants upon the ascertainment of a "fair price" by Messrs Ernst & Young. Ernst & Young valued the shares at RM2.94 million. The liquidators were of the view that the valuation was too low and flawed in law and did not represent a "fair value" and hence was not in accordance with the consent order.

[15] As a result, the Liquidators filed Kuala Lumpur High Court Suit No. D-22NCC-674-2009 ("the consent order suit") to essentially have the shares of Folin Food revalued on the grounds that the valuation by Ernst & Young did not comply with the consent order. The appellants counter claimed for specific performance.

[16] In order to further their cause in the consent order suit and to prevent the respondents, as liquidators of Folin Brothers, from defending the counter claim, the appellants sought mid-way to have the liquidators removed by filing encl. 368.

Issue Estoppel

[17] In the present case, the respondents raised the issue of issue estoppel and submitted that most of the allegations raised by the appellants against the liquidators in support of their application in encl. 368, including the issue of the removal of the liquidators, are allegations that have been raised and dealt with in the earlier oppression suit where a consent order dated 4 June 2010 had been agreed upon and concluded before the court. It was expressly stipulated in the said consent order that there shall be no liberty to file afresh. The consent order was clearly intended to put finality to the issues raised in the oppression suit. The respondents submitted in the premises, the appellants are estopped from raising the same issues again to support the present application in encl. 368.

[18] The learned High Court judge had made a finding that most of the issues raised in the present application have been raised in the oppression suit. At p. 10 of his grounds of judgment, the learned judge said:

> And in her written submissions in Enclosure 389 learned counsel for the Respondents has attached Annexure 3 which is a table of issues raised in the Applicant's affidavit supporting the application and the issues raised in the oppression petition. I have perused Annexure 3 with great care and I must say I agree with the Respondents' contention that most of the issues raised in this application against the liquidators have been raised in the oppression petition. They may not be exactly identical issues but they are indeed similar.

[19] This court had the opportunity to peruse the said Annexure 3 which was referred to by the learned judge which is a table of issues raised in the oppression suit and the present application and was satisfied and agreed with the finding of the learned judge on this issue ie, most of the issues raised in this application have been raised in the earlier oppression suit. On that ground, the appellants are estopped from raising the same issues again in the present application.

[20] The appellants contended that they are not precluded from raising the same issues again as the two proceedings are premised upon different causes of action, one being a shareholders oppression petition filed by the appellants as members of the subsidiary and the other being an application to remove the liquidators filed by the appellants as contributories of Folin Brothers.

[21] The doctrine of *res judicata* encompasses three conceptually distinct though interrelated principles, namely:

(a) cause of action estoppel which prevents a party from asserting or denying, as against the other party, the existence of a particular cause of action, the non-existence or existence of which had been determined by a court of competent jurisdiction in previous litigation between the same parties;

(b) issue estoppel which prevents a party from considering issues raised in previous proceeding; and

(c) the extended doctrine of *res judicata* or popularly known as the defence of abuse of process; it is the initiation of proceedings in a court of justice for the purpose of mounting collateral

attack upon a final decision which has been made by another court of competent jurisdiction in previous proceedings in which the party had a full opportunity of contesting the decision in the court by which it was made. (See: *Goh Nellie v. Goh Lian Teck & Ors* [2007] 1 SLR 453; *Thoday v. Thoday* [1964] P 181; and KR Handley, Spencer Bower, Turner and Handley: *The Doctrine of Res Judicata* (Butterworths, 3rd edn, 1996) at para. 182).

[22] On the issue of "cause of action estoppel", Diplock LJ (as he then was) in *Thoday v. Thoday (supra)* explicated in his judgment as follows:

> Cause of action estoppel, is that which prevents a party from asserting or denying, as against the other party, the existence of a particular cause of action, the non-existence or existence of which has been determined by a court of competent jurisdiction in previous litigation between the same parties. If the cause of action was determined to exist, ie, judgment was given upon it, it is said to be merged in the judgment. If it was determined not to exist, the unsuccessful plaintiff can no longer assert that it does; he is estopped *per rem judicatam*.

[23] On the issue of "issue estoppel", it was explained by Diplock LJ in the same case, *Thoday v. Thoday (supra)*, as follows:

> Issue estoppel, is an extension of the same rule of public policy. There are many causes of action which can only be established by proving that two or more different conditions are fulfilled. Such causes of action involve as many separate issues between the parties as there are conditions to be fulfilled by the Plaintiff in order to establish his cause of action; and there may be cases where the fulfillment of an identical condition is a requirement common to two or more different causes of action. If in litigation upon one such cause of action any of such separate issues as to whether a particular condition has been fulfilled is determined by a court of competent jurisdiction, either upon evidence or upon admission by a party to the litigation, neither party can, in subsequent litigation between one another upon any cause of action which depends upon the fulfillment of the identical condition, assert that the condition was fulfilled if the court has in the first litigation determined that it was not, or deny that it was fulfilled if the court in the first litigation determined that it was.

[24] In the present case, the earlier oppression suit and the present proceedings encl. 368, may have different causes of action as contended by the appellants ie, one being a shareholders oppression petition filed by the appellants as members of the

subsidiary (Folin Food) and the other being an application to remove the liquidators filed by the appellants as contributories of Folin Brothers, but the issues involved in establishing both of them may be similar and overlapping. Therefore the issue of issue estoppel as raised by the respondents may arise in the present proceedings and the appellants' contention on this issue holds no water.

[25] In *Lee Tat Development Pte Ltd v. Management Corporation of Grange Heights Strata Title No 301 (No 2)* [2005] 3 SLR 157, the Court of Appeal in Singapore held that the following requirements had to be met to establish an issue estoppel namely:

(a) there must be a final and conclusive judgment on the merit;

(b) that judgment must be of a court of competent jurisdiction;

(c) there must be identity between the parties to the two actions that are being compared; and

(d) there must be an identity to subject matter in the two proceedings.

[26] A consent order could form the basis of an issue estoppel as long as the order is final (see: The *Doctrine of Res Judicata (supra)* at para 38; *Kinch v. Walcott* [1929] AC 482; and *Goh Nellie v. Goh Lian Teck & Ors (supra)*. Thus the consent order dated 4 June 2010 entered into between the parties herein (appellants and respondents) which clearly states that there shall be no liberty to file afresh is capable of forming the basis of issue estoppel. The said consent order was a final and conclusive judgment on the merits between the parties. Thus the first ingredient for issue estoppel to apply has been satisfied.

[27] On the 2nd ingredient ie, the judgment is of a court of competent jurisdiction, there is no question that the court which had entered the consent order is a court of competent jurisdiction. This is fortified by the fact that the appellants themselves have sought to enforce the consent order by way of a counter claim for specific performance.

[28] With regard to the parties, except for the company Folin Brothers which was not a party in the oppression suit, the rest of the parties in the oppression suit and the present application are the same. Even though Folin Brothers was not a party to the oppression suit, it was clearly a party affected by the consent

order as the shares that were to be sold pursuant to the consent order belong to it. Issue estoppel may apply between the same parties or their privies (see: *Asia Commercial Finance (M) Berhad v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783; *Hunter v. Chief Constable of West Midlands Police* [1982] AC 529). Even though the parties may formally be different in the two proceedings, it does not and should not prevent the application of issue estoppel if they are privies to either one of the parties to the proceedings (per Lord Denning MR and Sir George Bakar in *Mc II Kenny v. Chief Constable of West Midlands* [1980] QB 283 at p. 322). Lord Diplock in *Hunter* case had also stated that issue estoppel may arise in civil actions between "the same parties or their privies". In the present case, Folin Brothers is a family company. The three appellants each own 25% of the issued and paid up shares in Folin Brothers and the remaining balance 25% is registered in the names of another brother, the late Wong Foh Ling and his son, Wong Boon Sun. At the material times, the estate of the late Wong Foh Ling and Wong Bon Sun were vested in the official assignee by virtue of them having been adjudicated bankrupt. The appellants also participated in the management of the company. Their relationship clearly shows that Folin Brothers was at the material times a privy to the appellants who were parties in the earlier oppression suit as well as in the present proceedings. Therefore in the present case the ingredient as to identity between the parties involved in the previous proceedings and the present application has also been satisfied.

[29] On identity of the subject matter, the oppression suit traversed the same grounds as the present application and the facts and circumstances giving rise to the consent order have not changed. A simple comparison of the issues raised in the present application, and the issues raised in the proceedings culminating in the consent order as set out in Annexure 3, as referred to by the learned judge in his grounds of judgment would show that the prior action traversed the same grounds as the present application.

[30] Therefore, all the four ingredients to establish issue estoppel have been satisfied. The oppression suit was settled by way of a consent order. The consent order was and is still valid, and had never been set aside by any party. One of the terms of the consent order is that there shall be no liberty to file afresh. Thus the consent order put to rest once and for all, all the issues in dispute between the parties in the oppression suit, and those issues, if they are similar or the same and if they are based on

the same or similar facts and circumstances, may not be raised again in any subsequent proceedings either for the same cause of action or a different cause of action. (See: *Ricky Thong Yew Fook v. OCBC Bank (M) Bhd & Ors* [2007] 10 CLJ 720; *Greenhalgh v. Mallard* [1947] 2 All ER 255; *Seruan Gemilang Makmur Sdn Bhd v. Badan Perhubungan UMNO Negeri Pahang Darul Makmur* [2009] 1 LNS 1457).

[31] On this ground alone, the appeal can be dismissed. The court has inherent jurisdiction to dismiss an action by applying the doctrine of res judicata even though it is not pleaded. (See: *Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd (supra)*).

[32] In addition to issue estoppel, the respondents are also entitled to rely on the wider principle of abuse of process or the extended doctrine of res judicata. Abuse of process may arise where there is no cause of action estoppel or there is no issue estoppel. It is not subject to the same test as in cause of action estoppel or issue estoppel. The task of the court in dealing with the issue of abuse of process is to draw a balance between the competing claims of one party and the right of the other not to be unjustly hounded given the earlier history of the matter. (See: *Bradford & Bingley Building Society v. Seddon* [1999] 1 WLR 1482). On this issue Lord Halsbury LC in *Reichel v. Magrath* [1889] 14 App Cas 665 at 668 had once stated:

> I think it would be a scandal to the administration of justice if, the same question having been disposed of by one case, the litigant were to be permitted by changing the form of the proceedings to set up the same case again.

[33] The decision of the House of Lords in *Hunter* case *(supra)* illustrates clearly the distinct features of the doctrine of abuse of process. The appellant in that case was one of the accused in a criminal trial. He and his other co-accused alleged that their confessions had been induced by police violence. The trial judge ruled that their confessions were voluntary and they were accordingly convicted. The appellant then brought a civil claim against the police for damages for assault based on the alleged violence inflicted in the course of extracting his confession. The House of Lords unanimously held that the claim should be struck out as an abuse of process because it was in fact an attempt to relitigate an issue that had already been decided. It was in essence a collateral attack, mounted by means of a civil action, against the decision of the criminal court on the same point.

[34] The doctrine of abuse of process applies to cases which fall outside the traditional reach of cause of action estoppel and issue estoppel but which have nonetheless been barred from proceeding. The doctrine has been recognized as a part of the law in England. (See: *Johnson v. Gore Wood & Co (a firm)* [2002] 2 AC 1; *Mc II Kenny v. Chief Constable of West Midlands (supra)*.

[35] In the present case, the same doctrine of abuse of process applies. The consent order dated 4 June 2010 was entered into between the appellants and the respondents in good faith to put an end to the issues raised in the oppression suit (including issue relating to removal of liquidators). Both parties had agreed that with the consent order the parties are not at liberty to file afresh. The appellants whilst seeking the consent order to be enforced against Folin Brothers and the liquidators in other proceedings had taken a completely inconsistent stand in the present application by seeking to raise issues which have been settled by the consent order. This is clearly an abuse of process. This is another ground under which the appellant's application *vides* encl. 368 as well as the present appeal before this court can be dismissed.

The Relevant Principles Of Law On Removal Of Liquidators

[36] A liquidator appointed by the court can only be removed by the court "on cause shown". Section 232(1) of the Companies Act 1965 provides that: "A liquidator appointed by the court may resign or on cause shown be removed by the court". The court does not have an unfettered discretion as cause must be shown. The question for determination by the court in respect of an application of this nature is whether under all the circumstances of the case due cause has been shown for the removal of the liquidator.

[37] Jessel MR in *Re Sir John Moore Gold Mining Co* [1879] 12 LR, Ch D 325 at p. 331 defined the words "on due cause shown" to mean "... as a general rule, they point to some unfitness of the person - it may be from personal character, or from his connection with other parties, or from circumstances in which he is mixed up ... some unfitness in a wide term of the term."

[38] The general applicable principle is that a liquidator may be removed if it is in the interest of all those who are interested in the company being liquidated to do so. (see: *Abric Project Management Sdn Bhd v. Palmshine Plaza Sdn Bhd & Anor* [2007] 10 CLJ 7).

[39] In *Re Adam Eyton Limited; Exparte Charlesworth* [1887] 36 Ch D 299, His Lordship Cotton LJ in commenting on the judgment on His Lordship Jessel MR above held at p 303 that: "... it is not necessary, in order to justify the court under this section in removing the liquidator, that there should be anything against the individual' instead '... if the court is satisfied on the evidence before it that it is against the interest of the liquidation, by which I mean all those who are interested in the company being liquidated, that a particular person should be made liquidator, then the court has power to remove the present liquidator and of course then appoint some other person in his place."

[40] In the same *Re Adam Eyton* case, His Lordship Bowen LJ then held in his judgment at p 306 that:

> ... the due cause is to be measured by reference to the real, substantial, honest interest of the liquidation and to the purpose for which the liquidator is appointed. Of course fair play to the liquidator himself is not to be left out of sight, but the measure of due cause is the substantial and real interest of the liquidation.

[41] In *Chua Boon Chin v. JM McCormack & Ors* [1978] 1 LNS 33, the court removed the liquidator as there arose a conflict of interest in that the liquidator was a director of the company in liquidation and had a close relationship with the other director. Accordingly when the issue arose as to whether or not to commence legal proceedings against the directors (which included him) the court was satisfied that it was against the interest of the liquidation that he remains the liquidator.

[42] Also in *Chua Boon Chin* case, the court referred to the case of *Re George A Bond & Co Ltd* [1932] 32 SR (NSW) 301, wherein His Lordship Long Innes J was quoted as saying:

> in my view neither suspicion alone, nor even a *prima facie* case which might be rebutted, would either justify or require removal unless there were reason for apprehension that the interests of the liquidation would be imperiled by the continuance in office of the suspect, or unless it were shown that such removal would be for the advantage of those interests in the assets of the company.

[43] Finally, in *Advance Housing v. Newcastle Classic Developments* [1994] 14 ACSR 230, it was held that there has to be a real and not merely theoretical possibility of conflict of interest before a liquidator can be removed. A liquidator may act even though there has been a prior involvement with the company in liquidation,

A provided that the involvement is unlikely to impede the liquidator from acting impartially. However, in this case, there was an actual conflict as the liquidator had to adjudicate on whether payments made to his firm immediately before the company went into liquidation constituted an unfair preference.

B

[44] The jurisdiction of the court to remove a liquidator under s. 232 of the Companies Act 1965 for 'due cause shown' is not to be exercised in the same way as if the power had been for the court to remove the liquidator 'if the court shall think fit'. Some C unfitness in the liquidator must be shown in order to justify his removal and the removing of him is not a matter of pure judicial discretion. That being the case a liquidator has a right to say that he is not to be removed unless due cause is shown.

D **[45]** The normal ground for removal of liquidator is that the liquidator has personal unfitness; has failed to act impartially or is in a position where his duty and interest are in conflict. As to what constitutes a conflict of interest, there has to be a real and not merely theoretical possibility of conflict before a liquidator can E be removed. (See: *Commonwealth of Australia v. O'Reilly* [1984] 52 ALR 031; *In re Sir John Moore Gold Mining Co (supra)*).

[46] In *Commonwealth of Australia v. O'Reilly (supra)* it was held that it is an integral part of a liquidator's duty to investigate the affairs of the company from its foundation onwards. A liquidator F who fails to investigate the affairs of the company to the prejudice of an applicant is in neglect of his duty and can be removed (see also: In *re Sir John Moore Gold Mining Co (supra)*). It cannot be a ground for removal that a liquidator is carrying out his duty to investigate the affairs of the company, even though some G interested party may object.

[47] In a case where the application for removal is by a creditor, all the creditors must be given notice of the application or it must be shown conclusively that the removal is for the benefit of all the H creditors. (see: *In Re White Cliffs Dredging Co* [1893] 11 NZLR 711).

[48] A liquidator is not bound to pursue a claim on behalf of the company, unless he believes that it has a reasonable prospect of success (see: *In re George A Bond & Company Ltd (supra)*). I

[49] Ultimately, fair play to the liquidator is not to be left out of sight. Where there are no assets which can be imperiled by the continuance in office, fair play to the liquidator may be the decisive factor (see: *In re George A Bond & Company Ltd (supra)*; and *Chua Boon Chin v. JM McCormack & Ors (supra)*).

Merit Of encl. 368

[50] For completeness and on the assumption that the defence of *res judicata* (issue estoppel and abuse of process) does not apply, the court shall now deal with the merit of the appellants' application (encl. 368) and the present appeal, in order to determine whether there is sufficient "cause" shown to enable the court to exercise its discretion to remove the respondents as liquidators of the company in question under s. 232(1) of the Companies Act 1965.

Unauthorised Payments Made To The Solicitors In Relation To KLHC Petition No. D4-26-74-2008 (The Oppression Suit)

[51] The oppression suit was filed by the appellants against the liquidators as nominee directors of Folin Brothers. The shares held by the liquidators are on trust for Folin Brothers. Therefore all fees to the solicitors in relation to the suit were properly made from Folin Brothers. This is fortified by the fact that the consent order entered into between the Liquidators and the appellants was for the sale of the assets of Folin Brothers namely the shares of Folin Food to the appellants. The learned judge had correctly directed his mind as to the true capacity in which the liquidators were being sued in the oppression suit and how they came to occupy that position. (See: p. 13 - 14 of the grounds of judgment).

[52] The liquidators as officers of the court are not as a general rule liable for costs in carrying out their duties, including their appointment as directors of the company or subsidiaries and the carrying out of those duties. Mc Pherson, *The Law of Company Liquidation* (4th edn) by Andrew R Keoy (at p. 338) explained the position as follows:

> If a Liquidator is compelled by statute to embark on a course of litigation, he or she will not be required to pay anything over and above the costs that are met by the available assets of the company. The same can be said where the Liquidator is the

Defendant to proceedings that were initiated in response to the exercise by the Liquidator of her or his duties. It was said by Cozens-Hardy MR in *Re Arthur Williams & Co.* that where:

> an official liquidator is simply performing duties which are obligatory on him in a judicial or quasi-judicial character, he is not to be made to pay the costs, because he is acting in the performance of his official duties.

[53] All payments made by the liquidators were properly disclosed in the statement of receipts and payments (Form 75) filed by the liquidators every six months in accordance with the provisions of the Companies Act 1965.

[54] An officer of a court, in carrying out his statutory duties, should not personally be made to pay for costs and expenses incurred unless there is bad faith. There is no proof of bad faith established by the appellants in this case. Therefore, to condemn the liquidators at this stage to incur expenses from their own pockets to defend the oppression suit when bad faith has not and is unlikely to be established is extremely unjust and inimical to the administration of justice.

Payment Made To Solicitors Acting For Folin Brothers Without Taxing The Bills Pursuant To r. 173 Of The Winding Up Rules 1972

[55] The appellants complained that the Liquidators have made unauthorised payments to lawyers acting for Folin Brothers without taxing their bills pursuant to r. 173 of the Winding Up Rules 1972. This is an issue that was clearly raised in the earlier opposition suit which has been determined in favour of the respondents.

[56] The court is in agreement with the learned judge on this point ie, that r. 173 only applies in respect of services rendered in the course of assisting the liquidator in the ordinary administrative and management duties of the liquidators as envisaged under s. 236(1) of the Companies Act 1965. (See: *Selvam Holdings (Malaysia) Sdn Bhd v. Toby Lam As The Receiver And Manager And Liquidator Of Selvam Holdings (M) Sdn Bhd & Anor* [1994] 4 CLJ 899; *Subterranean Natural Mineral Water Sdn Bhd v. Kho Boon Kwang* [2002] 6 CLJ 340; *Kang Wah Construction Sdn Bhd v. Chan Ai Min Property Sdn Bhd & Anor* [1999] 7 CLJ 172; and *Oriental Finance Bhd v. Syarikat Seri Paroi Sdn Bhd* [2003] 7 CLJ 414). In the present case, the services of the lawyers as explained in the

affidavits in the oppression suit was for defending an action on behalf of Folin Brothers under s. 236(2) of the Companies Act 1965. The liquidators have obtained an order dated 17 September 1997 from the winding up court to appoint the lawyers to act for Folin Brothers. The 1st appellant was responsible for negotiating the fees with the solicitors and the cheques for the payments were only signed by the liquidators after the payments were approved by the 1st appellant or the 2nd appellant. In other words, the so called "unauthorized payments made without taxation of the bills" were made after getting approval either the 1st or 2nd appellants. The Liquidators should not be held responsible and the appellants have no ground to complain. The liquidators have not committed any wrong doing in making such payments.

Unsubstantiated Payment Of Fees To Legal Firms Of Messrs Joseph Yeo And Messrs DT Mathews

[57] The appellants' complaint on this matter is not that these payments were improperly made as they have produced no evidence to substantiate improper payments by the liquidators but that the liquidators have failed to explain the payments of fees to the committee of inspection. This issue had been raised and dealt with in the earlier oppression suit and the appellants are barred from raising the same issue again by reason of *res judicata*.

[58] In any event the liquidators cannot be faulted for making payments of fees to solicitors for acting for Folin Brothers in the various suits that the liquidators have to deal with since taking office. It is pertinent to note that at the commencement of the liquidation, Folin Brothers and its subsidiary, Folin Food, were engaged in prolonged litigations which were subsequently settled or disposed of after the liquidators were appointed. All these required the services of solicitors who had to be appointed and paid to protect the interest of the companies. The global settlement would not have been achieved but for the litigations pursued by the liquidators together with the collaboration and active participation of the appellants in particular the 1st appellant. This is clearly insufficient to cause the liquidators to be removed under s. 232 of the Companies Act 1965.

[59] The payment to Messrs Joseph Yeo was made in 2001 and the payment to Messrs DT Mathew was made in 2005. However it was only in 2008 that the committee of inspection (of which the 1st appellant was also a member) asked for explanation by the liquidations as to the payments made. It appears that this issue

was raised as an afterthought to beef up the appellants' application in encl. 368. In any event the issue on both these payments were also raised and dealt with in the oppression suit, and should not be raised again in this application.

Failure To Consider Requests And Wishes Of The Appellants As Contributories And Committee Of Inspection For Accounts Of Folin Brothers And On Disposal Of Assets Of Folin Brothers

[60] This issue had been raised and ventilated in the earlier oppression suit. Therefore the appellants are barred from raising the same issue again on ground of issue estoppel.

[61] At p. 41, para 6.3(e) of the appellants' written submissions, the appellants submitted that despite queries and request made by the committee of inspection on account of Folin Brothers, no satisfactory explanation has been given by the liquidators. The liquidators have given explanation as to why the account could not be supplied when the request was made by the committee of inspection, but the appellants (as members of the committee of inspection) claimed that the explanation was not satisfactory. In the circumstances, it is not correct to say that the liquidators have 'ignored' the request made by the committee of inspection.

[62] The appellants also complained that the respondents as liquidators have failed to take into account the wishes of the appellants as contributories of Folin Brothers particularly on the sale of Folin Food shares (owned by Folin Brothers) to the appellants as envisaged by the consent order.

[63] The appellants jointly held 75% of the issued and paid up capital of Folin Brothers. They were the majority shareholders of Folin Brothers. The other 25% of the shares were registered under the name of the late Wong Foh Ling and his son, Wong Boon Sun. The liquidators have a duty to all the creditors and contributories of Folin Brothers, and not just the majority shareholders. Thus the liquidators cannot listen to the will of the majority and override the interest of the minority. The interest of all those who are interested in the company being liquidated must be considered (See: *In Re Adam Eyton (supra)*; *In Re George Bond & Co Ltd (supra)*).

[64] The appellants' complaint on this issue relates to the sale of the shares of Folin Food (owned by Folin Brothers) to the appellants as envisaged by the consent order dated 4 June 2009.

The said consent order specified that the sale of the shares to the appellants would be at "fair value". However the appellants are pushing the liquidators to sell the shares to them at an under value.

[65] In discharging their duties as liquidators, the respondents should be mindful that they have a duty not only to the appellants, (as majority shareholders and contributories) but also to all known creditors and to the other two shareholders/ contributories of Folin Brothers, namely the late Wong Foh Ling and his son, Wong Boon Sun. The appellants have been engaged in bitter litigation against the said Wong Foh Ling and Wong Boon Sun for many years.

Failure To Abide By The Consent Order

[66] The appellants have in their affidavits alleged that the respondents as the liquidators have failed to comply with the consent order in refusing to sell and transfer the shares of Folin Food (owned by Folin Brothers) to them as specified in the said consent order. In the said consent order the said shares were to be sold and transferred to the appellants at a "fair price", to be ascertained by Ernst & Young within 90 days from 4 June 2009, the date of the consent order.

[67] The respondents submitted that it was the appellants who have failed to comply with the said consent order as they have not offered to purchase the shares at a fair price, ie, not the fair value of the shares. It is the liquidators' duty to sell the assets Folin Brothers at the highest possible price. This is why the consent order specified that the sale of the shares to the appellants would be at "fair value". The valuation conducted by Ernst and Young does not reflect a fair price for the reason set out in the consent order suit filed by the liquidators to challenge the valuation prepared by Ernst and Young, in particular, Ernst and Young's basis of valuation is information provided only by the 1st appellant accounts which were unaudited and being challenged and a valuation report by valuer appointed by the 1st appellant.

[68] Therefore, the liquidators cannot be faulted for refusing to sell and transfer the shares (as the only assets of Folin Brothers) to the appellants at the undervalued price. They also cannot be faulted for initiating the consent order suit to challenge the valuation prepared by Ernst and Young in respect of the shares.

[69] The court observes that the application to remove the liquidators (encl. 368) was filed by the appellants with the ulterior motive of enabling the appellants to purchase the shares (Folin Brothers' only real asset) at an under value. Despite the existence of all these issues prior to the consent order being entered, the application to remove the liquidators (encl. 368) was only filed after the consent order suit was filed by the liquidators to challenge the purchase price of the said shares.

Other Allegations Against The Liquidators

[70] The appellants seek to rely on the fact that the liquidators did not attend a particular meeting of the committee of inspection on 30 March 2010 and did not provide explanations to the committee of inspection on issues raised. These issues are primarily issues which had already been raised in the oppression suit or already been determined by reason of the consent order. The appellants have continually raised the issues merely to harass and intimidate the liquidators.

[71] The appellants also alleged that the liquidators voted on the board of Folin Food to include the 2nd respondent as a signatory to the bank account, and this was done to gain control of Folin Food without the approval of the 1st appellant.

[72] The court is of the view that there is nothing sinister about the appointment of the 2nd respondent (one of the liquidators) as signatory of the bank accounts. There was no impropriety on this issue. In fact, the 1st appellant had himself previously voted in favour of appointing the 2nd respondent as a signatory. However when he realized the 2nd respondent would not merely act as he dictated and be his ally on the board, he conveniently changed his position.

[73] The liquidators have at all times disclosed all payments made in the process of liquidation. There is no evidence to show that the liquidators have acted fraudulently or with the intention to defraud Folin Brothers or Folin Food when deal with their bank accounts throughout the liquidation process. In any event, no cheques were issued without the approval of the 1st appellant.

[74] The appellants also complained that there was delay in the completion of the liquidation process. The respondents' explanation for the delay is as follows:

(a) the delay in the completion of the liquidation was caused by the various legal suits filed even before the respondents took office as liquidators. These suits were in fact filed or defended on the instructions given by the 1st appellant even after the liquidation commenced as the facts relating to the same were not within the knowledge of the respondents;

(b) most importantly was the suit filed by the Standard Chartered Bank which the respondents managed to resolve resulting in the only asset of Folin Food being cleared of all encumbrances. Without that resolution, the said asset would be encumbered and the creditors and contributories including the appellants would derive no benefit from the same;

(c) the completion of the liquidation has also been delayed by the oppression suit and the subsequent action to re-value the shares. These are actions brought about by the appellants themselves and cannot be blamed on the respondents; and

(d) the appellants had sat back and did nothing for the 23 year period that they have taken to complete the liquidation.

[75] The appellants also complained that the respondents had ordered the auditors to change the accounts of Folin Food. This relates to the action taken by the respondents with relation to the 2008 draft audited accounts of Folin Food which had included several unauthorized liabilities amounting in excess of RM500,000. The majority of the board of directors of Folin Food had instructed the accountants to reverse the authorized entries and send the same to the auditors for them to consider and approve the same. This is clearly in fulfillment of the board's duty to finalize the accounts. To date the auditors have failed to audit the revised account. Again the court is of the view that there is nothing improper for the liquidators to do that in the proper exercise of their duties under the law. Obviously, it is not a reason to remove the liquidators.

[76] At the material times, there were only four remaining creditors of Folin Brothers who have filed their proofs of debt. The 1st appellant is the largest creditor. The other creditors were Wong Nyeon Thiat, Wong Voon Ten and Syarikat Ban Foong Electrical Works. There is an authority to say that in a case where an application for removal of liquidator is by a creditor (as in the present case where the 1st appellant is the largest creditor) all the creditors must be given notice of the application or it must

be shown conclusively that the removal of the liquidator is for the benefit of all the creditors (see: *In Re White Cliffs Dredging Co (supra)*.

[77] In the present case there is no indication at all to show that the appellants have given the necessary notice to the other creditors of their intention to remove the respondents as the liquidator of Folin Brothers. There is also no indication to show conclusively that the removal of the liquidators is for the benefit of all the creditors (not only the appellants).

Conclusion

[78] It is trite law that the court should be slow to interfere with any act or decision of the liquidator in discharging their duties in the liquidation process particularly in matters involving commercial considerations and will only do so if it is so unreasonable and absurd that no reasonable person would have acted in that way. The court will not interfere with the decision simply because its opinion might differ from that of the liquidator. Generally the court will recognize that the discretion has been vested by statute in the liquidator and will not interfere unless it is shown that he did not address himself to the correct questions or has made errors of law, or has not exercised his discretion *bone fide* or has taken into account entirely irrelevant considerations or when there is fraud. (See: *Avon Downs Pty Ltd v. FC of T* [1949] 78 CLR 353; *Re Mineral Securities Australia Limited [in liq]* [1973] 2 NSWLR 207; *Leon v. York -O- Matic* [1966] 1 WLR 1450; and *Yeomans v. Walker & Anor* [1986] 10 ACLR 753).

[79] In the present case, the appellants have failed to show sufficient cause for the removal of the liquidators herein and the learned High Court judge had correctly directed his mind to the applicable test. It is a settled principle that a liquidator is to act in the interest of the company, its creditors and contributories. Thus to remove the liquidator it must be shown that the liquidator can no longer act impartially and objectively to protect those mentioned interests.

[80] The appellants in the present case must show that the respondents as the liquidators have abused their position for personal gain and benefit; or have not been able to act independently; or are no longer fit and proper persons to continue as liquidators for Folin Brothers. The appellants have failed to do so. On the other hand by challenging the valuation of Folin

Food's shares by Ernst & Young as being manifestly low and below the actual market value, the respondents have demonstrated their impartiality and integrity in protecting the interest of the company and its creditors.

[81] Looking at the whole circumstances of the case in its proper perspective, the court is satisfied that the application *vide* encl. 368 was made not in the interest of the company Folin Brothers in liquidation. It was made at the tail end of the liquidation process ie, to sell and transfer the shares of Folin Food, owned by Folin Brothers, to the appellants at a fair price as envisaged by the consent order. To remove the respondents as the liquidators at this stage of the process is clearly inappropriate and not in the interest of the company and its creditors as a whole. The only persons who will benefit most if the liquidators are removed at the present stage are the appellants themselves - for being able to buy the shares of Folin Food (the only asset owned by Folin Brothers) at an undervalued price as determined by Ernst & Young under the consent order, detrimental to the interest of other creditors and other contributories. The application *vide* encl. 368 is brought by the appellants clearly for the collateral purpose of controlling Folin Brothers, Folin Food and their assets so as to enrich themselves. This is an abuse of the process of court; and should not be allowed.

[82] On the above considerations, the appeal is dismissed with costs of RM20,000 to the respondents. We affirm the decision of the learned High Court judge dated 15 September 2010. Deposit to the respondents to account of costs.